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Supreme Court, U.S.
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Docket No. 98-1048

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

MARJORIE A. MEESTER,

Petitioner,

VS

MARVIN T. RUNYON, POSTMASTER GENERAL,
U.S. POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. CONFLICTING DECISIONS-RULE 10(a)-FECA ISSUE

After nearly five years of litigation and appeals in this matter, Respondent now admits that the Court of Appeals for the Eighth Circuit erred in affirming the United States Court for the District of North Dakota, Southeastern Division's holding that FECA bars Mrs. Meester's failure to accommodate claims under the Rehabilitation Act. (Resp. Brf. 8.) It seems apparent that since Respondent has now admitted that the Court of Appeals for the Eighth Circuit erred in affirming the lower court's holding that receipt of FECA benefits bars Mrs. Meester's failure to accommodate claims under the Rehabilitation Act, then if this holding is vitiated pursuant to Respondent's admission of its error, the Memorandum and Order of the United States Magistrate Judge Karen Klein denying Respondent's original Motion for Summary Judgment on that issue, (Pet. App. 24-35), would stand and a trial by jury would be had. However, it appears that Respondent now claims that, although the Court of Appeals for the Eighth Circuit erred in its affirmance, the end result in this case was appropriate for different factual reasons. (Resp. Brf. 8-15.) In making its argument, Respondent alleges factual inaccuracies central to the issue and fails to acknowledge that a "suitability" determination pursuant to the FECA is substantially different from the "affirmative" obligation required under the Rehabilitation Act.

The Memorandum and Order of United States Magistrate Judge Karen Klein clearly delineates factual disputes. It provided the following:

> "The court, when considering a motion for summary judgment, must view the evidence in the light most favorable to the nonmoving party, who enjoys "the benefit of all reasonable inferences to be drawn

> from the facts." Vacca, 875 F.2d at 1339 (citation omitted). In light of the testimony from Dr. Orson and Jeremy Cahill, this court finds that whether the USPS has made a "good faith" attempt to reasonably accommodate Meester is a material fact over which reasonable minds could differ. Even though the USPS has come very close to satisfying its burden, the court concludes that on the present record the USPS has not fully shown, as a matter of law, that it has engaged in "good faith" efforts to accommodate Meester's disability. Consequently, Meester has a colorable claim for compensatory damages and it therefore is entitled to a jury trial."

Since the standard of review for a grant of summary judgment is de novo, *Salve Regina College v. Russell*, 499 U.S. 225 (1991) and Respondent has admitted that the lower courts erred in their decisions of the legal issue presented, and the question of whether an employer has provided "reasonable" accommodations is a question of fact for a jury, *Frye v. Aspin*, 997 F.2d 426, 428 (8th Cir. 1993), Mrs. Meester is entitled to her jury trial and her writ of certiorari should be granted in order to remand this matter back for trial by jury.

The various genuine disputes of material fact, in which a reasonable trier of fact could find that the Postal Service failed to provide reasonable accommodations to Mrs. Meester, and by failing to do so, further exasperated the injury to Mrs. Meester's upper extremities, include the following:

1. First, in Respondent's Brief in Opposition, Respondent repeatedly states that Ms. Meester's doctor approved the position determined "suitable" by the Department of Labor. (Resp. Brf. 5, 12.) However, Respondent fails to inform the Court of the whole truth surrounding what aspects of the job offer were approved by Dr. Orson. The job offer read as follows:

"UNITED STATES POST OFFICE

DATE: September 9, 1991

REF: SO:LGD:dk

SUBJECT: Revised Job Offer

Marjorie Meester

601 Pheasant Run

West Fargo, ND 58078

This revised job offer is being made by the U. S. Postal Service, Fargo, ND in compliance to your physical limitations and medical restrictions as outlined by your personal physician, Dr. Gregory G. Orson, MD, and recommendations by Barbara K. Peterson, OTR/CHT from her on-site evaluation of the previous job offer of January 31, 1991. This job offer is also being made to comply with Office of Workers' Compensation Programs determination as directed by letter dated August 16, 1991, regarding your wage loss experienced with a 32 hour week verses a 40 hour week you are entitled to. You will also receive ten paid federal holidays per year as a full time regular employee, under limited duty. This revised job offer allows you to perform assigned tasks at your own pace and with assistance as needed, as in previous job offer. We are prepared to offer you the following position.

CLERK-MODIFIED

PS-5, Current Step and Salary (Level 5, Step 0, $15.46/hr.)

Your daily work hours will be 8:00 AM to 5:00 PM Saturdays and Mondays and 11:00 AM to 5:00 PM Tuesday through Friday. Your duties will be as indicated below.

1. Check in Carriers: Approximately 45 carriers return from their routes beginning around 2:00 PM and normally ending around 4:00 to 4:30 PM. Work involves making a check mark or initial on a pre-printed form and placing of keys (2 keys on a chain) into appropriate separation in a case at

chest level. A verification is made to insure accountable mail given the carriers in the morning has either been delivered or returned. The normal process of checking in a single carrier takes approximately one minute with several minutes between carriers. In the case of several carriers arriving in a group, other clerks are available to assist you to prevent any form of repetitive action. This job assignment is the same as you have been performing since your return to work.

Page 2. Revised Job Offer

2. Answering Telephones: Assist managers by answering phones and taking written messages during the hours assigned which do not involve the check in of carriers. The telephone at this work station will be placed on the desk to eliminate any excessive reaching. A visual check and slight fingering of carrier **Hold Mail Cards** and **Change of Address Cards** will be required occasionally to answer customer inquiries. This task is also the same as that which you are presently performing with the exception that the hours are extended to provide you with a 40 hour week.

This revised job offer is being forwarded to your private physician, Dr. Gregory G. Orson and your physical therapist, Barbara K. Peterson for their assessment and approval. This letter must be returned within 10 days from the date of receipt with your election. If we fail to hear from you, we will consider our offer as rejected.

If you refuse to accept this position, we will so advise the Office of Workers' Compensation Programs. Refusal of this revised job offer may result in loss of compensation benefits.

/s/ D. Bellefeuille

D. Bellefeuille
MSC Manager/Postmaster
Fargo, ND 58102-9998

I accept this offer: **Subject to the conditions set forth below.

I reject this offer:

/s/ Marjorie Meester
Name

Name

9-17-91
Date

Date

cc: OWCP - Denver, CO
Timothy Hill, Atty.
cc: with cover letter: Dr. Orson
Ms. Peterson

**

1. Approval by attending physician and physical therapist;
2. That the position be regarded as permanent subject to final approval by the OWCP;
3. That I be entitled to two (2) consecutive days off each week and that I am only required to be scheduled for a five (5) day work week;
4. That I be entitled to frequent breaks as necessary."

As is illustrated, Mrs. Meester approved the job offer on the condition that she receive two consecutive days off as requested by her treating physician, Dr. Gregory G. Orson. Dr. Orson approved the job offer only upon the added conditions as is illustrated by his report that follows:

Fargo Clinic 737 Broadway
MeritCare Fargo, North Dakota 58123
We've Got the Touch (701) 234-2000
ORTHOPEDICS 09/24/91 RE: MEESTER, Marjorie
FARGO CLINIC #: 532754-9

Mrs. Meester is seen in recheck. She reports that she was having increased discomfort a couple of weeks ago. Also, there has been increased stress from work and trying to settle a permanent job description. She has had to take the last 2 weeks

off, which seemed to be giving her significant improvement.

Brief examination today shows continued tenderness about the right, greater than left, lateral epicondylar regions and dorsal forearms. Has tenderness about both the trapezial ridges and paracervical areas as well. She also has discomfort and tightness down the right paraspinal region to the sacral area.

We have received a job offer from the post office, which has been revised by the patient's attorney. I have reviewed the offer and the conditions set forth. I will approve this with the conditions. As noted on my 8/27/91 note, I do feel that she would do much better to work 5 days only and have 2 consecutive days off. Recheck 1 month.

/s/ G. Orson
GREGORY G. ORSON, M.D./kms

cc: Timothy Hill"

In summary, Mrs. Meester's doctor did not approve the position as structured, but rather approved the position with the conditions noted on the job offer. Subsequently, the Postal Service continually refused to provide the requested conditions and this lawsuit resulted.

2. Second, on page 4 of Respondent's Brief in Opposition, Respondent incorrectly states that Mrs. Meester's 25% impairment of her upper extremities prevented her from performing her duties as a postal clerk. However, in this case, it has been undisputed that Mrs. Meester was given a "CLERK-MODIFIED" position (see above job offer) when she returned to work and has been performing this position since March of 1991 with no complaints by the Postal Service. In fact, the "CLERK-MODIFIED" position Mrs. Meester currently holds is a postal clerk position that has been restructured to accommodate some of Mrs. Meester's physical limitations but has failed to fully accommodate Mrs. Meester's disability. Since "job restructuring" and "modified work schedules" are forms of reasonable accommodation, it should not be disputed that Mrs. Meester actually performs her original postal clerk position in a modified status. 29 C.F.R. § 1614.203(a)(6) and (c)(2)(ii). Clearly,

an employee who performs work that is actually a modification of the duties of the employee's pre-injury position is a "qualified individual with a disability". *Trimble v. Carlin*, 633 F.Supp. 367, 369-370 (E.D. Pa. 1986). As an end note, it should be pointed out that on April 25, 1998, the Postal Service did finally grant Mrs. Meester the accommodations of two consecutive days off each week after approximately eight (8) years of continued requests, and Mrs. Meester has had and will need further surgery due to the exasperation to her upper extremities.

3. Third, on page 5 of Respondent's Brief in Opposition, Respondent insinuates that Mrs. Meester does not perform essential work. At trial, Prairiewood Station Manager Richard Bolme, Mrs. Meester's boss, testified to the following:

> "Q: You can work Marj on a Monday through Friday, can't you?
> A: I can work her on any day. I mean, it's –
> Q: Okay, and that's because the work that she does needs to be done every day of the week, isn't that right?
> A: Yes.
> Q: It's meaningful work, right?
> A: Yes.
> Q: It's essential work down at the Prairiewood Station?
> A: Just like any other job, the job that you do -- this work that we do at Prairiewood as a postal service job.
> Q: This just isn't make work, is it?
> A: No, it's all work that has to be done."

Respondent also states at page 5 of its Opposition Brief that the position did not previously exist, it's not a regular postal service job and will be eliminated if and when Mrs. Meester leaves the employ of the Postal Service. However, Prairiewood Station Manager Richard Bolme testified as follows at trial:

> "Q: And when Marj leaves or retires, what have you -- you say that the position is going to disappear, but that work is going to have to be absorbed by somebody else, isn't it?
> A: That work has to be performed by somebody

else, yes. Somebody has to answer the phone whether it be her, a supervisor, another clerk."

Therefore, contrary to Respondent's statements, Mrs. Meester's position would not be eliminated but would, in fact, be absorbed by other employees.

4. Fourth, Respondent further argues at page 5 of its Opposition Brief that the Postal Service determined it could not provide Mrs. Meester with two consecutive days off because Mondays and Saturdays were the busiest days, and Sundays were always a day off. However, Respondent takes this language from a lower court decision citing no factual record for its support and fails to inform the Court that on April 25, 1998, the Postal Service finally granted Mrs. Meester two consecutive days off each week. In addition, at trial, Prairiewood Station Manager Richard Bolme testified that he could work Mrs. Meester on a Monday through Friday basis. *See* above-quoted trial testimony. Therefore, Respondent was never able to prove undue hardship with regard to accommodating Mrs. Meester with two consecutive days off each week.

Notwithstanding the above factual disputes, Respondent errs in stating that a failure to accommodate claim under the Rehabilitation Act raises precisely the same issue of a suitability determination under the Department of Labor Office of Workers' Compensation Program. Respondent fails to acknowledge that the Rehabilitation Act demands more than equality of treatment by the federal government, it requires **affirmative action** to accommodate employees with disabilities, unless such accommodation would impose an undue hardship on the employer. *Carr v. Reno*, 23 F.3d 525, 528 (D.C. Cir. 1994). Section 501 of the Rehabilitation Act demands a great deal from employers in the way of accommodation of its disabled employees. *Id.* at 530. Congress has placed a heavy burden on the Postal Service to accommodate individuals with handicaps, and courts have not taken lightly their role in enforcing the rights that the Act dictates. *Id.* at 531. Therefore, with regard to Respondent's argument that a suitability determination by the Department of Labor and a failure to accommodate claim under the Rehabilitation Act are one in the same, they are not. A much higher standard is required of the Postal Service in reasonably

accommodating its disabled workers as compared to the Department of Labor's standard in making a suitability determination.

Respondent appears to be arguing that the Postal Service only has a minimal duty to provide reasonable accommodations to its disabled employees. (Resp. Brf. 12-14.) Respondent even cites a religious accommodation case in support of its argument. *Id.* As this Court is aware, religious discrimination cases are held to a standard of accommodation that is no more than a de minimis cost to the employer. *Ansonia Board of Education v. Philibrook*, 479 U.S. 60 (1986). Whereas, disability discrimination cases analyzed under the Rehabilitation Act require the Postal Service to be a "model employer" of the disabled and impose upon the Postal Service an affirmative obligation to provide reasonable accommodations for its disabled workers. *Prewitt v. U.S.P.S.*, 662 F.2d 292, 307 (5th Cir. 1981). As a result, Respondent's attempt to have this case analyzed under a religious discrimination case standard is unfair and incorrect.

In summary, because Respondent has now admitted that the receipt of benefits under the FECA does not bar a subsequent failure to accommodate claim under the Rehabilitation Act, and because of the factual disputes in this case, this Court should grant certiorari and remand the matter back to the lower court for trial by jury. As stated by the Honorable Circuit Judge Heaney of the Eighth Circuit Court of Appeals in his dissent in this case, the mischief done by the lower court can only be undone by Congress, our court en banc, or the United States Supreme Court. (App. 18-19).

II. IMPORTANT FEDERAL QUESTION-RULE 10(c)-PUNITIVE DAMAGE ISSUE

With regard to the issue of whether punitive damages should be allowed against the Postal Service, Respondent argues that the United States District court for the District of North Dakota, Southeastern Division, refused to allow an amendment for punitive damages on the basis that the Amended Complaint was filed more than a year after the District Court's deadline for amending the Complaint to add new claims or defenses. (Resp. Brf. 15.) In response, the standard set forth in Rule 15 of the Federal Rules of

Civil Procedure was not properly followed by the lower court, and the lower court clearly abused its discretion on the issue of delay. "[D]elay alone . . . is an insufficient ground upon which to deny a motion to amend. Rather, the touchstone is whether the nonmoving party will be prejudiced if the amendment is allowed." *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984). Therefore, the lower court's first reason in denying Mrs. Meester's Motion to Amend, that of being filed too late, was insufficient.

Further, as is illustrated by the lower court's decision, the lower court granted amendments to Mrs. Meester's complaint on some issues at the same time when it denied Mrs. Meester's Motion to Amend the Complaint for a punitive damages claim. (Resp. App. 1a-13a.) Clearly, delay was an insufficient basis, and an abuse of discretion is substantiated by the fact that the lower court allowed other amendments at that time.

With regard to the substantive issue of whether or not the Postal Service should be subjected to a claim for punitive damages, Mrs. Meester points out that there is a conflict between the recent decision of *Baker v. Runyon*, 114 F.2d 668 (7th Cir. 1997) and the United States Supreme Court's decision in *Loeffler v. Frank*, 486 U.S. 549 (1988). Because of this contradiction, this Court should grant certiorari on this issue.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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